

THE LEGAL CHALLENGES IN RECOGNISING THE TALIBAN

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The [Taliban's horrific takeover of Afghanistan](#) has triggered a new debate in international law on the issue of recognising an entity that claims to be the new government of a state. This debate assumes significance because [China](#) and Russia, two of the five permanent United Nations Security Council members, have seemingly shown readiness to recognise a Taliban-led government whereas countries like Canada have opposed it. Questions of recognition do not arise when change of government within a state occurs when political power is transferred through legal means. However, things are different when the change of government happens through extra-legal methods like ousting the sitting government using unconstitutional means. The Taliban's takeover of Afghanistan squarely falls in this category.

Recognition of governments under international law is vital for several reasons. It is important to know who the governing authority of the state is, who has the responsibility for effectually carrying out domestic and international legal obligations ranging from pursuing diplomatic relations to the protection of human rights, and so on.

Situation in Kabul under Taliban 'better' than it was under Ghani govt: Russian envoy

A salient point to remember is that recognition of the government should not be confused with recognition of the state under international law. As Malcolm Shaw, the celebrated international lawyer, writes, "a change in government, however accomplished, does not affect the identity of the State itself." Thus, in the current debate, the issue is not about the recognition of Afghanistan, whose legal personality remains intact. Whether countries recognise the Taliban regime or not will depend on their political considerations and geo-strategic interests, as evident from the Chinese and Russian overtures. However, certain criteria have evolved in international law on deciding the issue of recognition of governments and these need to be prudently looked at.

Traditionally, the test used in international law to make a decision about the recognition of a new government is that of 'effectiveness'. According to this principle, to recognise a government means to determine whether it effectively controls the state it claims to govern. In other words, it means to determine whether the government has effective control over the state's territory (or a part of it), a majority of the population, national institutions, the banking and monetary system, etc. with a reasonable possibility of permanence. The inherent assumption is that effective control means the people of the country accept, or at least acquiesce to, the new regime; if they did not, they would overthrow it. Under this doctrine, it is immaterial how the new government occupied office (whether through civil war, revolution, or a military coup). Since there is hardly any doubt that the Taliban now effectively controls Afghanistan, as per this test, it would be recognised as Afghanistan's government for international law and thus, international relations.

A doctrine competing with the effective control theory is that of democratic legitimacy. According to this doctrine, recognition of a government also depends on whether it is the legitimate representative of the people it claims to govern. So, governments that capture power through non-democratic means — notwithstanding their exercising de facto control over the country — should not be recognised by states. The end of the Cold War, the subsequent spread of democracy in the world, and the growing demand for universal respect for human rights gave an impetus to this doctrine in the last three decades.

China says sanctions on Taliban not productive

This doctrine has led many countries to bestow de jure recognition (legal recognition) on governments in exile in place of governments exercising effective control. Two recent examples can be offered. First, many countries recognised Yemen's Abdrabbuh Mansur Hadi government in exile since 2015 on the ground that the rebellious separatists acquired power in Yemen through illegal means. Second, the Nicolás Maduro government in Venezuela is not recognised by several countries due to the alleged lack of democratic legitimacy.

The Taliban regime, despite exercising effective control over Afghanistan, lacks democratic legitimacy. Thus, it would fail to be recognised as the legitimate representative of Afghanistan if the doctrine of democratic legitimacy is applied. Things would become even more complicated if the Afghan President, Ashraf Ghani, who fled the country when the Taliban entered Kabul, were to announce a government in exile.

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However, some international lawyers like Erika de Wet doubt whether the doctrine of democratic legitimacy, notwithstanding its worth and instinctive appeal to the champions of liberal democracy, has become a binding part of customary international law when it comes to the recognition of governments. In other words, governments may rely on the doctrine of democratic legitimacy to refuse de jure recognition of the Taliban. Nevertheless, there is no binding legal obligation on countries to withhold recognition of the Taliban on the ground that it does not enjoy democratic legitimacy. Thus, if Russia and China were to formally recognise the Taliban regime due to its effective control of Afghanistan, it would be consistent with international law.

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Given the Taliban's brutal past, its extremist ideology, and profound absence of democratic legitimacy, India is within its right to withhold de jure recognition of the Taliban regime. Nonetheless, it will have to find a way to engage with the Taliban given India's huge investments in Afghanistan and stakes in the South Asian region. India should adopt a clear policy that it will deal with the Taliban simply because it is the de facto government, not because it is a legitimate one. This principle should be followed for bilateral relations and also for multilateral dealings such as within the South Asian Association for Regional Cooperation.

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To reassure Indian Muslims, the PM needs to state that the govt. will not conduct an exercise like NRC

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